IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11108 of 2000
with
SPECIAL CIVIL APPLICATION No 11109 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MANSUKHLAL NANJIBHAI PATEL

Versus

DY. COMMISSIONER OF INCOME - TAX

Appearance:
MR KH KAJI for Petitioner
MR AKIL QUIRESHI for MANISH R BHATT for Respondent No. 1, 3
MR SN SOPARKAR for Respondent No. 2

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE D.A.MEHTA

Date of decision: 17/04/2001

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE B.C.PATEL)

#. These two petitions are filed by the petitioner challenging the validity of the order dated 20th June, 2000 passed by the Income Tax Appellate Tribunal, Rajkot (hereinafter to be referred to as "the Tribunal") and notice dated 4.9.2000 issued by the Revenue under section 148 read with section 147 of the Income Tax Act, 1961 (hereinafter to be referred to as "the Act"). Short facts necessary for disposal of these petitions which are required to be stated are as under.

#. Respondent no. 2 Ambica Realities Pvt. Ltd. is a company registered under the Companies Act, 1956, having its office at Rajkot. Petitioner is a silent director of the said respondent no. 2 - Company whereas one Mr. D.V. Jethani was Managing Director who was controlling finance as well as other business activities of the said Company.

#. The Revenue carried out search and seizure proceedings under section 132 of the Act in December, 1996 at the office premises of the company as well as residential premises of the directors including the residential premises of the petitioner herein. During the search proceedings, certain documents were seized even from the premises of the petitioner. The petitioner's case is that it was made clear to the Revenue that the papers found from the residence were given to him by Mr. D.V. Jethani, Managing Director and that he would be in a position to render explanation about the contents of the said documents. About the figures indicated in the seized papers, it was indicated that the figures were pertaining to the profits of the Company wherein the petitioners had 6.25% share in the profit.

#. Assessing Officer by an order dated 29.12.97 computed total income of Rs. 50,93,550/-for the block period which included the amount of Rs. 67,820/- and Rs. 13,53,500/- on protective basis being 6.25 % of the profits of the Company being Rs. 10,85,125/- and Rs. 2,16,56,000/-. It is specifically averred by the petitioner that in the assessment order of the petitioner additions were made on the protective basis as the Assessing Officer came to a conclusion that the said income belonged to the company. The Assessing Officer also made an order under section 158-BC of the Act on 29.12.97 in the case of the Company assessing its total income at Rs. 3,06,90,138/- which included the aforesaid amount of Rs. 10,85,125/- and Rs. 2,16,56,000/-.

#. So far as the company is concerned, through its Managing Director, appeal was preferred being IT(SS) No.11/RJT/98. The petitioner also filed an appeal against the order of assessment made against him being IT (SS) No.7/RJT/98, challenging the additions on protective basis.

#. The petitioner being not a party to the appeal preferred by the company was not aware about the hearing of the matter. However, as the petitioner came to know that the matter was heard by the Tribunal, the petitioner addressed a letter on 29th February. 2000 to the Tribunal. Relevant part of the letter reads as under.

> "I understand that appeal filed by Ambica Realities Pvt. Ltd. bearing ITA (SS) No. II/R/98 has already come up for hearing on 28.2.2000. The issue involved therein has connection with my appeal. My appeal is at present fixed for hearing on 13.3.2000.
>
> I am approaching Your Honours through this petition with a request to kindly decide both appeals together."

However, as nothing was heard in the matter, before the judgment was delivered in the appeal filed by the company, the petitioner addressed a letter on 27th May, 2000 pointing out as under.

> "Two of the disputed additions made in my case are on protective basis. The same additions are made on substantive basis in the case of Ambica Realities Pvt. ltd. (ITA (SS/II/R/98). In view of these facts I wish to reiterate my request that both appeals may please be decided simultaneously. In other words decision in appeal no. ITA (SS)/II/R/98 which is heard on 28.2.2000 may please be kept in abeyance till my appeal is also heard by Your Honours.
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> I am reiterating my request as above as my appeal which was fixed for hearing on 26th May 2000 has been adjourned at the request of the Department."

It seems that the Tribunal though was made aware about the aforesaid situation made order on 20th June, 2000. The Tribunal in para 28 arrived at a conclusion as under.

> "In view of the discussion above, we are of the

considered view that both the seized papers belong to Shri M.N. Patel and the entire profit of Rs. 10,85,125/- mentioned on seized papers 8 and 10 respectively has to be assessed in the hands of Shri M.N. Patel from whose custody the papers have been seized."

#. Mr. Kazi, learned counsel appearing for the petitioner submitted that the Tribunal despite being informed has pronounced the judgment. Mr. Kazi further submitted that without hearing the petitioner, the Tribunal has fastened the liability on the petitioner to a very large extent which is not permissible under the law.

#. Mr. S.N. Soparkar, learned counsel appearing for the company submitted that he has no objection if the part by which the petitioner is aggrieved is removed from the impugned judgment. According to his submission, findings are recorded by the Tribunal so far as respondent-Company is concerned on the material placed on the record and after hearing the counsel for the Revenue, hence, atleast that finding should not be disturbed. He was required to argue as Revenue submitted that it would have been proper for the Tribunal if both the matters would have been heard together and decided one after the other. According to the petitioner paras 21 to 28 are required to be quashed which pertain to liability of the company as well as the petitioner. Mr. Soparkar submitted that if the Court is of the opinion that the finding is required to be quashed and set aside, then the entire order must be quashed and set aside and the Tribunal should be directed to hear the matter afresh. He further submitted that against the findings of the Tribunal on the issues which are against the Company, the Company has preferred Tax Appeal No. 1368/2000 before this Court. According to him, it would not be proper if part of the judgment is confirmed and the questions raised therein are decided by this Court and the part of the judgment which was not challenged by the Revenue is remanded back to the Tribunal for adjudication afresh.

#. It is clear from the finding recorded by the Tribunal that the petitioner in his statement as well as in the written statement has pointed out to the Revenue, his ignorance about the contents of documents and that can be seen from the order of Tribunal in sub-para (v) of para 22 on page 35. The same is as under.

"The learned counsel of the assessee company thus, contended that the above papers seized from

the residence of Sri M.N.Patel were not belonging to the company. He further stated that Sri M.N. Patel, himself in his statement as well as in his written submissions stated that "you can treat this sheet either of Ambica Realities or the name of persons whose names are there or you can get the correct information from the Director of the Company. I am silent Director of the company having no business power." Thus, according to the learned counsel, it is clear that Shri M.N. Patel was not sure whether the property actually belongs to Ambica Realities or to someone else. He was not having any information about the transaction as mentioned on the paper, he was only a silent director of the company."

After keeping these aspects in mind, the Tribunal in para 24 has observed as under.

"Shri M.N.Patel has not explained in his statement why this paper was handed over to him by Shri Jethani. The contention of Shri M.N. Patel that he was not aware about the contents of these papers is without any basis and cannot be believed. Shri M.N. Patel is carrying on his independent business of construction along with his son, therefore, these papers must be pertaining to his unaccounted funds invested in his own business. In law, if certain documents have been found from the premises of somebody during the course of search, it is presumed that such documents belong to him unless he proves with evidence that such documents belong to some one else. In this case, the documents have been recovered from the premises of Shri M.N. Patel and in his statement, he has simply stated that such documents belong to the assessee without bringing on record any evidence."

The Tribunal in the said para observed as under.

"In the present case, the paper seized belong to Shri M.N. Patel and he was duty bound to explain the contents of such papers. He has not advanced any evidence which would establish that the papers belonged to the assessee company except saying that the same was handed over to him by Shri Jethani, another director of the assesee-company."

In paras 25 and 26, the Tribunal has indicated as to how

the Assessing Officer has erred or how the Assessing Officer has ignored certain aspects. The Tribunal was aware that advocate Shri Rajubhai Shukla and advocate of the assessee was also engaged in the similar business with the assessee company. In para 27, the Tribunal has also recorded that despite the material being placed, the Assessing Officer has not examined the persons and no reasons have been placed on record. After indicating certain transactions in the said para, at the end the Tribunal has observed as under.

> "This would have been clinching evidence to prove the nexus of the seized papers with the assessee company or with Shri M.N. Patel. This has not been done by the A.O., therefore, it cannot be used as an evidence against the assessee-company."

In para 25, the Tribunal has also recorded as under.

> "The Assessing Officer has also not caused necessary inquiries to find the real nature of these seized papers and he has also not established with evidence to whom these papers actually belong."

Reading that part of the order, it is clear that there is not only non-application of mind but there is apparent perversity as there cannot be any percentage in profits in case of the company. Reading paras 21 to 28, finding recorded by the Tribunal cannot stand as found in para 28 and particularly expressing an opinion that the income should be in the hands of Shri M.N. Patel from whose custody papers have been seized. We have made it clear that the order has been made without hearing the petitioner. If the Tribunal would not have recorded any finding, the matter would have been different. The Tribunal could have come to a conclusion that the company is not concerned with the documents and therefore, the company is not liable. The petitioner would have no cause of actin to approach the Court. But discussion from paras 21 to 28 is interwoven in such a way that despite the finding recorded by the Tribunal that the Assessing Officer has also not caused necessary inquiries to find out real nature of these seized papers and that he has also not established with evidence to whom these papers actually belonged, has held that the income has to be assessed in the hand of Shri M.N. Patel from whose custody papers have been seized. Thus, the findings are contradictory and cannot stand and therefore, the Tribunal must be directed to decide afresh that issue.

We are of the view that in a matter like this, when attention of the Tribunal was drawn, the Tribunal ought not have disposed of the matter and should have disposed of both the matters after giving an opportunity to the parties. If such procedure would have been adopted, no injustice would have been caused either to the assessee or to the Revenue. In a case of protective assessment, the Allahabad High Court in the case of Smt. Hemlata Agarwal v. Commissioner of Income Tax, U.P. [64 ITR P. 428] had an occasion to consider as to what the Tribunal ought to have done in the case like this was to hear both the appeals together and finally determine as to whether impugned sum was at all the income of the husband or the wife.

##. So far as the contention of Mr. Soparkar that entire order should be quashed and not in part is concerned, it is required to be noted that the Tribunal has decided several issues and it is not the case that for all the issues, they can be said tobe similar issues as the issue in question raised before us is found to be decided in a manner not warranted by law and therefore, only that issue is required to be decided by the Tribunal in accordance with law. For other issues we are not to be understood that we have expressed any opinion. It must not be understood that we have confirmed the decision of the Tribunal, with regard to other issues. The Court in the instant case is required to consider the only issue raised before it.

##. In view of what we have stated hereinabove, we quash and set aside paras 21 to 28 with a direction to the Tribunal to decide that part afresh as early as possible without being influenced by the order made by this Court. It is further directed that both the appeals should be heard together. The Special Civil Application No. 11108/2000 stands allowed to the aforesaid extent. Rule is made absolute to the aforesaid extent. In view of the findings recorded hereinabove, Special Civil Application No. 11109/2000 is allowed and notice, Annexure : A dated 4.9.2000 issued under section 148 of the Act stands quashed and set aside with no order as to costs. Rule is made absolute in Spl.C.A. No. 11109/2000.

[B.C. PATEL, J.] [D. A. MEHTA, J.]

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